UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects	Docket No. AD12-9-000
Priority Rights to New Participant-Funded Transmission	Docket No. AD11-11-000

COMMENTS OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to the July 19, 2012 Proposed Policy Statement,[1] the Transmission Access Policy Study Group ("TAPS") comments on proposed reforms to the Commission's policies governing the allocation of capacity on new merchant transmission projects and new cost-based, participant-funded projects.

As described below and in TAPS' March 29, 2012 Comments,[2] TAPS is very concerned that the Proposed Policy—which would allow developers to allocate up to 100% of the capacity of new merchant and non-incumbent participant-funded transmission facilities[3] by bilateral negotiations, including to affiliates, subject to open solicitation and reporting requirements—will severely undermine the non-discriminatory open access that the Commission has rightly found to be the foundation for competitive wholesale markets, and critical to meeting the Commission's statutory obligations to

[1] Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based Participant-Funded Transmission Projects, 140 FERC ¶ 61,061 (2012), eLibrary No. 20120719-3021 ("Proposed Policy").

[2] Comments of the Transmission Access Policy Study Group, eLibrary No. 20120329-5168 ("TAPS March 29 Comments").

[3] Because the Commission proposes to treat merchant and non-incumbent participant-funded projects essentially the same, we refer to them both as merchant projects or developers, unless the context warrants distinguishing between the two.

ensure just, reasonable, and not unduly discriminatory rates. In addition, it will result in the wrong transmission being built in a manner that will undermine regional transmission planning processes and hamstring access to competitive generation and transmission development for years to come. We therefore urge the Commission *not* to eliminate open season requirements and otherwise relax its merchant transmission policy as proposed.

If, nevertheless, the Commission moves forward in this direction, TAPS suggests the following additional safeguards to reduce the opportunity for abuse:

- Focus open solicitation and reporting requirements on all expressions of customer interest, the selection of customers for negotiations, and deviations from published selection criteria.
- Expand reporting requirements to include interactions with the regional planning process.
- Clarify that the new reporting requirements will have consequences for requested Commission approvals, with heightened scrutiny if the report reveals any of the following red flags:
    - Non-uniform rates and terms or deviations from published selection criteria;
    - Exclusion of prospective customers;
    - Application of "negotiated" rates, terms, and conditions to an affiliate; or
    - Exclusive or near-exclusive access.
- Subject all projects to Open Access Transmission Tariff ("OATT") expansion requirements.

Finally, as we understand it to be proposing, the Commission should maintain its current policy regarding incumbent, cost-based participant-funded projects, preserving the heavy burden to justify departures from the incumbent's OATT.

INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 30 states, promoting open and non-discriminatory transmission access.[4] As load-serving entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members recognize the importance of both open access and a robust transmission grid to competitive generation markets, and have long advocated policies to get needed transmission built. [5]

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COMMENTS

I. THE COMMISSION SHOULD RETHINK ITS PROPOSED POLICY

Under existing Commission policy, a merchant developer seeking negotiated rate authority is allowed to directly negotiate the allocation of "priority rights" for up to 75% of the project capacity to one or more "anchor" customer(s), so long as it holds an open season for the remainder and offers the same terms and conditions negotiated with its anchor customer(s) to open season customers. Proposed Policy PP 5, 8. Current policy

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[4] Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Cindy Holman, Oklahoma Municipal Power Authority, is TAPS' Vice Chair. John Twitty is TAPS' Executive Director.

[5] *See* TAPS, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost* (June 2004), *available at* http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf.

also requires Commission approval when a developer expects an affiliate to participate as a customer on the merchant project (P 23), imposing higher scrutiny and requiring merchants to show the affiliate is not "afforded an undue preference."[6] We are unaware of any case where the Commission has approved a merchant developer's allocation of rights to its own affiliate by bilateral negotiations.[7]

The Proposed Policy eliminates the 75% ceiling on bilaterally negotiated priority rights and the requirement to hold an open season. Instead, it would allow developers to allocate up to 100% of the project capacity to one (or more) customers (which may include affiliates) through bilateral negotiations. PP 2, 12. Developers no longer need to use the same terms and conditions when dealing with multiple parties. Rather, the developer and its customer(s) are authorized to negotiate "individualized terms that meet their unique needs," so long as "the differences in negotiated terms recognize material differences and do not result in undue discrimination or preference." P 18. The Proposed Policy adds open solicitation and reporting requirements to provide transparency. While retaining the requirement that the Commission approve affiliate priority rights and the potential for Section 206 complaints, the Proposed Policy leaves unclear how the Commission will ensure just, reasonable, and not unduly discriminatory rates for transmission service, and the open access foundation for competitive markets.

As TAPS urged at the February 28, 2012 Workshop, in our March 29 Comments following up on that Workshop, as well as in TAPS' May 5, 2011 follow-up comments in

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[6] *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 at PP 49-50 (2009) ("*Chinook*").

[7] See Part II.D.3 below.

Docket No. AD11-11,[8] and in Terry Wolf's Written Statement for the March 15, 2011 Technical Conference at which he appeared as a panelist for TAPS and Missouri River Energy Services,[9] the Commission should not adopt measures that erode fundamental open access policies, result in the proliferation of undersized, single-purpose merchant transmission facilities with restricted access, and rate pancakes that will balkanize the grid and impair competitive wholesale markets. Instead, it should be guided by open access principles and regional planning requirements, and take steps to promote broader use of inclusive joint ownership approaches to transmission development, which can deliver better results consistent with the Commission's statutory obligations and competitive market goals.

For the reasons expressed in our earlier comments (which are incorporated by reference), TAPS urges the Commission not to eliminate open season requirements and relax affiliate restrictions,. We highlight below a few key points:

By eliminating open season requirements, the Proposed Policy recreates the pre-Order 888 "national patchwork of open and closed transmission systems, with disparate terms and conditions of service" that the Commission rightly determined was inherently discriminatory.[10] The non-discriminatory open access required by Order 888 provides

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[8] Comments of the Transmission Access Policy Study Group following up on March 15 Technical Conference, eLibrary No. 20110505-5101.

[9] Statement of Terry Wolf on behalf of Missouri River Energy Services and the Transmission Access Policy Study Group March 15 Technical Conference, eLibrary No. 20110316-4012 ("Wolf Statement").

[10] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539, 21,541 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,673 (1996), *clarified*, 76 FERC ¶ 61,009 (1996) ("Order 888"), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also* Order No. 888, at 31,635 ("[W]e

the foundation for the Commission's ability to rely, to a large extent, on competitive wholesale generation markets to discipline wholesale power rates to just and reasonable levels[11]—restricting the ability of transmission providers to limit access and to add new rate pancakes that the Commission has found constrain markets.[12]

Transmission is a natural monopoly.[13] Because of its cost, siting fatigue, and right-of-way limitations, transmission cannot be readily duplicated.[14] A small wind developer excluded from a merchant project is unlikely to be able to reach the market at all, much less at reasonable cost.

Once a developer takes on an anchor customer, its opportunity and incentives align with that customer. In effect, the merchant becomes vertically-integrated-by-contract and an arm of its anchor customer, with an incentive and opportunity to use control over transmission to exclude competitive generation, or impose burdensome

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must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others."); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662, 17,676 (proposed Apr. 7, 1995), FERC Stats. & Regs. ¶ 32,514 at 33,071 (proposed 1995) ("Order 888 NOPR") ("Unless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized. If utilities are allowed to discriminate in favor of their own generation resources at the expense of providing access to others' lower cost generation resources by not providing open access on fair terms, the transmission grid will be a patchwork of open access transmission systems, systems with bilaterally negotiated arrangements, and systems with transmission ordered under section 211. Under such a patchwork of transmission systems, sellers will not have access to transmission on an equal basis, and some sellers will benefit at the expense of others. The ultimate loser in such a regime is the consumer.").

[11] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809, 810-11 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 30,992 (1999) ("Order 2000"), *order on reh'g*, Order No. 2000–A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *appeal dismissed for want of standing sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). *See also* Order 888, at 31,651-52, 31,682-84.

[12] Order 2000, at 31,003-05, 31,173-75.

[13] *See, e.g.*, Order 888, at 31,649.

[14] In contrast, gas pipelines, which are underground and sited by this Commission, face fewer obstacles.

terms, thus inhibiting the competitive functioning of those markets, harming consumers, and producing unjust and unreasonable rates. That an affiliated or unaffiliated generator exercises this control over transmission through negotiated merchant-anchor customer arrangements, rather than owning transmission, does not eliminate concerns about use of transmission market power to exclude or burden competitors, or otherwise exercise market power in generation markets.[15] As recognized in Order 888:[16]

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive ownership of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.

Thus, the Commission long ago saw through merchant developer claims (*see* Proposed Policy PP 7-8) that their incentives prevent use of control over transmission to exercise market power and distort generation competition.[17] The Commission should not accept such claims now, as the Proposed Policy (P 13) appears to do to some degree.

Allowing the merchant developer the ability, through bilateral negotiations with one or more anchor customers, to tailor the size of, and select the customers allowed firm

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[15] For example, if the merchant is free to bilaterally negotiate different rates for each customer, the merchant and an anchor customer can agree to rates, terms, and conditions that split the anticompetitive gains from excluding other generators from access to the transmission project (and, because of siting difficulties facing additional projects, potentially all access to the market).

[16] Order 888, at 31,643 (quoting *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,777 (1989)).

[17] *See also* Comment of the Staff of the Federal Trade Commission at 8 (June 14, 2012), eLibrary No. 20120615-5034 ("Policymakers should be vigilant for a variety of transmission withholding strategies, including a firm's effort to structure contracts to prevent other firms from either using the proposed line or paying to increase the line's capacity. These strategies may include strategic routing, sizing, configuration, interconnection or contracting.").

access to, the project will enable the customers to exclude or burden their generation competitors, and engage in other abusive practices that the Commission thought it was eradicating through Order 888.[18] Elimination of the obligation to offer a substantial portion of a project's capacity to would-be customers on the same rates and terms as the anchor customer removes a critical underpinning of non-discriminatory open access. No longer will "all wholesale buyers and sellers . . . have equal access to the transmission grid" as required to support robust, competitive generation markets.[19]

In addition, especially in light of the merchant transmission exemption from the planning processes required by Order 1000 (apart from a limited analysis of the reliability and operational impacts of interconnecting the merchant facility),[20] the Proposed Policy invites transmission development that frustrates the intent of getting the most efficient, cost-effective transmission built, contrary to what Order 1000 recognizes as the

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[18] Order 888 at 31,682-83 (finding unduly discriminatory and anticompetitive practices by "transmission monopolists" that the Commission has a duty to "eradicate," based in part on Appendix C, *id.* at 31,919-26 (detailing abuses against TAPS members, including examples of transmission providers purchasing and reselling energy they refused to transmit; refusing or delaying access to transmission; or offering it only on unreasonable terms)). See also Order 888 NOPR at 33,073-33,0734 (individual negotiations identified as a source of undue discrimination). The ability to individually negotiate rates and terms and reject creditworthy customers, makes real the "perception" of an opportunity to discriminate whose elimination has been the basis for open access reforms. *See, e.g.*, Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266, 12,273 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 at P 41 (2007) ("Order 890"), *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 74 Fed. Reg. 12,540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 Fed. Reg. 61,511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

[19] *New York v. FERC*, 535 U.S. 1, 10 (2002) (quoting Order 888 NOPR, FERC Stats. & Regs. at 30,049).

[20] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842, 49,870-71 (Aug. 11, 2011), FEC Stats. & Regs. ¶ 31,323 at PP 163-65 ("Order 1000"), *reh'g denied*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012), *review docketed sub nom. S.C. Pub. Serv. Auth. v. FERC*, No. 12-1232 (D.C. Cir. filed May 25, 2012).

Commission's statutory obligation.[21] The 50-year lifespan of transmission facilities, and their impact on future development in a dynamic AC grid, makes it essential that the Commission focus on getting the *right* transmission built as Congress directed in FPA Section 217(b)(4),[22] not ensuring that particular merchant projects succeed.

The merchant developer, supported by anchor customers, does not have an incentive to "right size" the line to meet all uses. To the contrary, their economic incentive is to undersize the project to maximize its congestion rent value (e.g., to size the line to preserve enough transmission scarcity to maintain a disproportionate difference in energy and capacity prices between the two ends of the line) and to exclude the anchor customer's generation competitors. Where the merchant developer is an affiliate of the anchor customer, the potential for abuse is even greater. Such motives lead to undersized lines that limit access to renewable generation-rich areas, do not further reliability, and undermine the Commission's responsibility to ensure just, reasonable, and not unduly discriminatory or preferential rates. Inefficient build-out creates the need for multiple future expansions (with associated rework) and duplicative facilities, making it more costly to access new generation, assuming such development is not blocked completely. While participant-funded development is unlikely to produce the major expansions required to meet our needs (as Order 1000 found (P 723)), the merchant line (once in

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[21] *Id*. P 52 (addressing planning processes that fail to promote more efficient and cost-effective development of new transmission facilities is necessary to ensure just and reasonable rates).

[22] FPA § 217(b)(4), 16 U.S.C. § 824q(B)(4), requires the Commission to facilitate the planning and expansion of transmission facilities to meet the reasonable needs of the load-serving entities, and enable them to secure long term rights for their power supply arrangements.

place) creates an obstacle to future development because, e.g., of siting fatigue or right-of-way limitations.[23]

In short, it is a mistake for the Commission to allow for up to 100% of the capacity to go to one or more anchor customers (which may be an affiliate) on individually negotiated rates, terms, and conditions. Instead, the Commission should not relax its merchant policies, should continue to require a substantial portion of the capacity to be made available to other customers through an open season, on same rates and terms as are applied to the anchor customer(s), and should adopt the additional safeguards proposed in TAPS' March 29 Comments.

II. IN THE ALTERNATIVE, THE COMMISSION SHOULD ADOPT MEASURES TO MAKE ITS PROPOSED POLICY MORE CONSISTENT WITH ITS STATUTORY OBLIGATIONS

A. Open Solicitation and Reporting Requirements Should Focus on Expressions of Customer Interest, Selection of Customers for Negotiations, and Deviations from Published Criteria

If, despite TAPS urging, the Commission proceeds along the course set forth in its Proposed Policy, TAPS urges modifications of the open solicitation and reporting requirements so that they are better adapted to achieving the Commission's objectives and provide a better foundation for a more searching examination of whether the proposed allocation of priority rights, and negotiated rates, terms, and conditions, are just, reasonable, and not unduly discriminatory or preferential. First, we suggest that greater attention be paid in the open solicitation and reporting requirements to: expressions of customer interest; the initial selection of customers for bilateral negotiations; and for each

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[23] *See* Parts II.B and II.D.2 below. Indeed, the merchant developer and its anchor customer(s) will have a strong economic incentive to oppose new upgrades that would reduce congestion, thereby destroying the economic value of exclusive rights over the merchant line, or otherwise undermine the ability of the anchor customer(s) to restrict generation competition.

of the two distinct phases of the open solicitation process, inconsistencies between the published decisionmaking criteria and those actually used to make the determinations.

The Proposed Policy (P 16) requires disclosure of the criteria to be used to "select transmission customers" in the notice to be broadly disseminated, observing that it will contribute to transparency and help interested entities know the features of the project and how bids will be considered. The Proposed Policy (P 18) then jumps to the negotiation process "once a subset of customers has been identified by the developer," and allows for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria. What seems to be missing (beyond open season requirements or any obligation to offer the same rates, terms, and conditions to any, much less similarly situated, customers) is a focus on the process of identifying the subset of customers for which bilateral negotiations are conducted. While item 6 in Paragraph 21 requires disclosure of the criteria used in the early stage of the process, as well as in the final award of transmission capacity, neither that paragraph nor Paragraph 20 specifies that if different criteria are used for the two phases of the customer selection process, the criteria to be used at each stage be separately specified in the notice. Nor is it clear that the developer must justify differences between the criteria advertised and used. It is also not clear whether the required explanation of the reasons for rejecting customers (Proposed Policy P 21(7)), or not expanding or prorating capacity (P 21(3), (4)), must include every customer that expressed interest in the project but was not deemed worthy of negotiations.

The initial selection of potential customers for negotiations may be crucial in determining whether the merchant line is more likely to be coopted by a small group of

anchor customers and undersized to enhance their generation market power by excluding competitors, or whether the open solicitation yields a result more consistent with an open season, in which a wider array of customers and uses are considered and accommodated. For example, does the developer have the flexibility to start with the most attractive customer (e.g., well-funded, willingness to take a large amount of capacity, willingness to share risk) before it considers bids from other would-be customers that have expressed interest, effectively enhancing the likelihood of 100% or near-100% anchor customers? Is there any obligation to solicit bids or otherwise negotiate with all potential customers that meet a stated, reasonable creditworthiness threshold (as would be required under the OATT) and other non-discriminatory criteria identified in the initial notice? As discussed above, if the developer has the flexibility to stop considering additional customers once it has found an anchor customer, the developer becomes effectively the construction arm of that customer, with every incentive to limit the access to competitors. For example, if a deep pocket wind generation customer can capture the full firm capacity of the merchant line, it can exclude smaller would-be wind developers from the firm capacity required for locking in a purchased power agreement with a load-serving entity, leaving that would-be developer foreclosed from the market, except (of course) if it sells its output to the anchor customer. That scenario does not foster robust wholesale competition among generation, but reflects the same ability and incentive to exploit control over transmission to enhance the anchor customer's generation function as the Commission thought it eradicated in Order 888.

To minimize the opportunity for abuse, TAPS suggests that the Commission more clearly focus on this initial selection of potential customers with whom the developer will

negotiate, and make clear that it expects developers to enter negotiations with all qualifying customers or have a strong justification for not doing so. Disclosure in both the notice and the report of criteria used for that "first cut," as distinct from the second phase awards of capacity (if criteria are different), is reasonable and not unduly burdensome. It takes developers at their word when they claim that they have every incentive to solicit widely for customers (Proposed Policy P 13), and makes them demonstrate that they have walked the walk, rather than just talked the talk.

Further, the Commission should make clear that the report must not only disclose the criteria actually used to distinguish among customers (P 21(6)), but also justify any deviations between those announced in the notice and those actually used. Given the clear tension between Order 888's premise that "all wholesale buyers and sellers . . . have equal access to the transmission grid" as required to support robust, competitive generation markets,[24] and the Proposed Policy's invitation to select among customers rather than accommodate all creditworthy customers, the merchant should have to justify its criteria as not only consistent with non-discriminatory open access principles, but also with its published criteria. Differences between the "before" and "after" criteria are a red flag that the selection criteria may be distorted by undue discrimination or preference, e.g., an anchor customer's desire to exclude competitors. Such differences would also undermine the Proposed Policy's intent (P 16) that open solicitation enable interested entities to know at the outset the features of the project and how bids will be considered.

Finally, reporting requirements should be clarified to encompass disclosure of all expressions of interest in the project, at whatever stage, and the basis for not moving

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[24] *New York v. FERC*, 535 U.S. 1, 10 (2002) (quoting Order 888 NOPR, FERC Stats. & Regs. at 30,049).

forward with each would-be customer. P 21(7). The required transparency should include disclosure of the degree of interest and the amount of capacity (if indicated) that the would-be customer was considering. Such potential uses should also be addressed in the report's description of decisions related to sizing of the facility. P 21(3), (4). More complete disclosure is essential to achieve some transparency as to the needs not met by the merchant line, to provide a record for Commission assessment of requested approvals (*see* Part II.C below), better inform protesters and potential complainants as the Proposed Policy intends (P 12), and better inform states considering whether to a approve a line that fails to meet all identified needs (P 22 n. 35).

B. The Reporting Requirement Should Include Interactions with the Regional Planning Process

Order 1000 does not require merchant developers to participate in the regional planning process (apart from a limited analysis of the reliability and operational impacts of interconnecting the merchant facility).[25] While TAPS believes that this omission will undermine the objectives of Order 1000,[26] TAPS recognizes that the Commission is unlikely to impose such a requirement in this docket.

However, the absence of a *requirement* for merchant developers to participate in the regional planning process, beyond the "impact check," does not make a developer's *voluntary* participation (or not) in the process irrelevant to whether granting negotiated rate authority or otherwise approving a merchant/participant funded line is consistent with statutory requirements. To the contrary, a developer's submission of its project for full consideration in the regional planning process would support its satisfaction of the

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[25] Order 1000, PP 163-65; Order 1000-A, P 234.

[26] *See* TAPS March 29 Comments at 9-12, 15-19.

broad notice element of the Proposed Policy's open solicitation requirements. The regional planning process is a key forum for publicizing proposed projects, as noted at the February 28, 2012 Workshop.

Further, evaluation of the merchant project in the regional planning process would provide better information for Commission and state consideration. Such bodies could take some comfort from planning process determinations that the merchant line is right-sized to meet identified needs and, while not selected for regional cost allocation, meshes well with the regional plan and expected future development. On the other hand, if the regional planning process concludes that the merchant project does not meet identified needs, will impede grid development, or develops alternative proposals that better meet the range of needs, that determination should be available for consideration in the siting and permitting process, as well as by this Commission. *See* Part II.D.2 below. The planning process can take a long-term view of needs and assess whether a "gated community" is likely to restrict long-term development.[27] Similarly, the planning process can identify corridors where there is heightened concern about undersizing and exploitation of exclusive usage rights. Siting fatigue can turn any project into an essential facility because of the difficulty of getting a second line sited in an area.[28] Where available rights-of-way are limited—whether due to the difficulty of obtaining regulatory approvals, existing land use patterns, or other reasons—undersizing is particularly problematic.

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[27] What may now be a radial line to renewable resources at the fringe may be a more central part of the network in a decade or two. If usage and expansion are hamstrung by access limitations, it will be needlessly difficult and costly to address load-serving entity and reliability needs for these areas in the future, much less provide for an effective outlet for the area's renewable resource potential.

[28] *See* Wolf Statement at 8.

Voluntary participation of the merchant project in the planning process would also give the region an opportunity to select the project in the regional plan, subject to regional cost sharing.[29] Both Order 890 and Order 1000 require non-discriminatory consideration of nonincumbent proposals,[30] with Order 1000 providing additional protections, including substantially eliminating any Federal right of first refusal.[31] If a developer's incentive is to get its project financed and built, it should be pleased to have the project included in the regional plan and funded regionally, making it more likely (according to Order 1000 (P 42)) to be built. At the February 28 Workshop, a number of developers asserted that merchant and participant-funded transmission will be used only when rolled-in development is unavailable.

Thus, it would advance the Commission's transparency objectives and statutory requirements (including its obligations under FPA Section 217(b)(4)), without conflicting with Order 1000's determination not to require merchant participation in the regional planning process (beyond the impact test), to expand the Proposed Policy's reporting requirements to include an explanation of the degree to which a merchant project was voluntarily put forth in the regional planning process, and any evaluation of the project

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[29] For example, in 2003, a merchant company was granted negotiated rate authority for the proposed Chesapeake Transmission Line, a 230 kV line connecting the Chalk Point, Maryland Substation and the Vienna, Maryland Substation. Letter Order, *Chesapeake Transmission, LLC*, 105 FERC ¶ 61,088 (2003). In 2005, the merchant developer withdrew the transmission interconnection request for this line. PJM, Merchant Transmission Queues: Withdrawn, *available at* http://www.pjm.com/planning/merchant-transmission/trans-queue-withdraw.aspx. In October 2007, based on forecasted load growth, PJM approved a transmission line over the same pathway as part of its regional expansion plan, but at a much larger size (two 500 kV HVDC). While PJM recently put this project on hold, it continues to be considered in terms of how best to meet regional needs. PJM, Mid-Atlantic Power Pathway, *available at* http://www.pjm.com/planning/rtep-upgrades-status/backbone-status/mapp.aspx.

[30] *See* Order 1000, PP 315 (describing requirements under Order 890), 328 (describing Order 1000's enhanced requirements).

[31] *Id.* PP 313, 318-19.

by the regional planning process. While a merchant's failure to submit its project for full consideration in the regional planning process would not prevent it from moving forward, such participation is relevant to assessing whether the project is consistent with the Act's requirements, as well as determinations to be made by state permitting bodies, and thus disclosure should be required.

C. The Commission Should Clarify That the New Reporting Requirements Will Have Consequences for Requested Approvals

To satisfy its statutory obligations, the Commission should clarify that it will *use* the information provided in the Proposed Policy's new reporting process to assess whether applicants will receive: (1) negotiated rate authority; (2) permission to allow an affiliate to participate as a customer on the proposed merchant project; or (3) authorization to use an anchor-customer-type model to allocate the capacity of non-incumbent, cost-based, participant-funded projects.

It is unclear from the Proposed Policy what consequences, if any, would attach to the contents of the new report described in Paragraphs 19-23. Footnote 29, for example, states that to the extent a merchant transmission developer "substantially complies" with any policies ultimately adopted by the Commission, "the developer would be deemed to have satisfied the second (undue discrimination) and third (undue preference) factors of the four-factor analysis" that was established in *Chinook*[32] to determine whether the allocation of merchant transmission capacity satisfies the Federal Power Act.

The mere filing of a report is insufficient to satisfy either of those factors. The content of a report, if detailed enough, could certainly *inform* a Commission decision as

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[32] *Chinook* P 37.

to whether a developer's proposed method for setting prices and allocating capacity is not unduly discriminatory and not unduly preferential. But it would violate Section 205 of the Federal Power Act for the Commission to "deem" a jurisdictional public utility's rates to be not unduly discriminatory, and not unduly preferential, simply because the developer applies *some* criteria and discloses those criteria in a filing.

The Proposed Policy is otherwise ambiguous with respect to the consequences that attach to the report. Paragraph 22, for example, states that when a merchant developer files its report in conjunction with its request for negotiated rate authority, or as a compliance filing to the Commission's negotiated rate order, "interested entities" will have the opportunity "to submit comments on the report, or otherwise protest the contents or insufficiency of the report, to ensure that there is sufficient transparency, as well as to provide Commission oversight in the capacity allocation process." Although the reference to a protest opportunity suggests that the new requirement might be more than just an informational filing, it is unclear whether the Commission envisions that the information contained in the report will be used to support an affirmative finding by the Commission as to whether a merchant developer's approach is not unduly discriminatory and will produce just and reasonable rates.

Meanwhile, Paragraph 20 suggests that the purpose of the report is just transparency—providing information, so that a potential customer can determine if it was treated in an unduly discriminatory way, and can make an informed decision as to whether to "file a complaint under section 206 of the FPA." And in contrast to affiliate participation requests, for which the Proposed Policy states that "the Commission will expect an affirmative showing that the affiliate is not afforded an undue preference" (P

23), the Proposed Policy does not state that an "affirmative showing"—based on the new report, or otherwise—would be required for other approvals requested by developers.

The Commission should clarify that the report is an essential part of a merchant developer's request for negotiated rate authority or other Commission approval, and that the proponent will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable, as Section 205 requires.[33] Shifting the statutory burdens by relying on objecting parties to file a Section 206 complaint, as suggested in Paragraph 20, is insufficient, as the Commission acknowledged in Order 1000-A when it found that transmission providers must establish non-discriminatory *ex ante* cost allocation methods.[34]

The necessary Commission findings can only be made based on an evaluation of the *outcome* of the capacity allocation process and negotiations with individual customers. To determine whether potential customers have been unduly discriminated against, or if the developer has deliberately undersized the line to give its anchor customer(s) a competitive advantage, the Commission must first know whether potential customers requested capacity on the line and were either denied the opportunity to engage in negotiations, or not selected to be customers at a later stage. Because

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[33] Commission "flexib[ility] in evaluating new proposals for transmission development and pricing . . . cannot compromise consumer protections by exceeding the bounds of the Federal Power Act or the Commission's open access requirements." *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, P 58 (2009) ("*Mountain States*") (citations omitted).

[34] The Commission found that "litigating complaints burdens and unduly delays the transmission planning process." Order 1000-A, P 576. The fact that such complaints have not been filed in the past is a testament more to their cost, difficulty, and associated delay, than evidence that all is well under the Commission's current policy, much less the absence of potential abuse under a new policy providing much greater flexibility. *See also* Order 888, at 31,682 (recognizing reluctance to file complaints and that their absence does not negate findings of undue discrimination).

authorization to engage in bilateral negotiations with each customer is inherently permission for the transmission provider to discriminate, the only way to know whether that discrimination is "undue" is to scrutinize the particular negotiated rates that resulted from the bilateral negotiations.

Unless a merchant developer includes adequate structural safeguards in its allocation and pricing processes—e.g., open season requirements for a substantial amount of the capacity, and a binding obligation to offer the same rates, terms, and conditions to similarly situated prospective customers—there is no way for the Commission to support the findings required by the Federal Power Act in advance of the completion of those processes. In those circumstances—notwithstanding the Proposed Policy's statement (P 21 n.34) that transmission developers "may continue to file requests for negotiated rate authority at various stages of their project development process"—any approvals granted by the Commission before completion of the allocation process can only be provisional, subject to scrutiny of the project's final allocation, terms, and pricing. Only if there are real consequences associated with the report can the Commission have any hope of inducing behavior that does not undermine competitive wholesale markets.

D. The Commission Should Particularly Scrutinize Proposals That Have the Hallmarks of Undue Discrimination

Assuming that the report described in the Proposed Policy is to be meaningful, as TAPS suggests, the Commission should seriously scrutinize proposals with red flags signaling that the results of the merchant developer's capacity allocation and pricing process may be unjust, unreasonable, and unduly discriminatory.

1. If rates, terms, and conditions of transmission service are different among customers, or if criteria change from the published criteria

Different rates, terms, and conditions for similarly situated customers are the hallmark of undue discrimination.[35] While developers at the February 28, 2012 Workshop claimed that they need the authority to bilaterally negotiate separate rates with each customer, the desire to see a merchant project succeed does not trump the Commission's obligations to prevent undue discrimination and ensure just and reasonable rates. In evaluating developer reports, the Commission must assess the specific criteria used to justify rate discrimination, and it should be highly skeptical of criteria that have the effect of discriminating against small customers and likely competitors of the anchor customers.

The Commission should likewise be alert to situations in which the developer changed its selection criteria in the middle of the process. While some changes may be *de minimis* or reasonable response to changed or unexpected circumstances, altering the capacity allocation and pricing processes mid-stream presents a moving target for potential customers; and because such behavior is also consistent with a desire to manipulate the process, the Commission must scrutinize the changes to assure that they are not being used to improperly exclude or burden potential competitors.

2. If the merchant developer turned away potential customers, or failed to accommodate all uses

The burden of demonstrating that the capacity allocation process is not unduly discriminatory should be particularly high if the merchant developer turned away

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[35] Order 888, at 31,548.

potential customers, or failed to consider and accommodate all uses of the facility. As discussed in Parts I and II.B, anchor customers—and, by proxy, the merchant developers that effectively serve as their construction contractors—have a strong incentive to undersize transmission lines to gain a competitive advantage in generation markets. Rejections of potential customers and refusals to expand capacity must be carefully examined by the Commission to assure that the jurisdictional rates, terms, and conditions are not being used to undermine competitive generation markets by enabling preferential and exclusive access to essential transmission facilities.

The Commission should also be alert to the likelihood that merchant lines will not be configured to maximize reliability and other system benefits.[36] As the Commission has recognized, the interconnected grid is a "single machine,"[37] and merchant lines will affect the operation of the system to which they are connected. While the impact analysis required by Order 1000 (PP 163-65) should prevent immediate grid instability issues caused by such lines, merchant developers will not have the financial incentive to design their facilities to maximize reliability benefits for the system as a whole.

Merchant developers also lack the incentive to design and construct facilities that are flexible enough to accommodate all needs, much less the changing needs on a dynamic AC grid. As described in TAPS' March 29 Comments at 12-14, while the Brookings Line was still being studied by the CapX2020 process in 2008,[38] Outland

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[36] Such evidence may be available from the regional planning process, to the extent the merchant elects to participate in that process and the Commission requires all interaction with the regional planning process to be included in the report, as TAPS requests. *See* Part II.B.

[37] Order 1000-A, P 560 (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 179 (D.C. Cir. 1994)).

[38] CAPX2020, a joint transmission-planning process in the northern Midwest, consisting of eleven investor-owned, municipal, and rural cooperative utilities in Minnesota, North Dakota, South Dakota, and Wisconsin that have jointly planned needed transmission upgrades and have opportunities to jointly own

Renewable Energy, LLC, a merchant developer, proposed a sponsor-funded line with endpoints almost identical to those of the Brookings Line. Both projects were designed to transmit significant wind generation from southwest Minnesota to Midwest load centers; but the Brookings Project met multiple needs by including five substations and multiple interconnections to other systems along its route. In response to wind generators concerns that the line be sufficiently robust to accommodate future generation, the Brookings Line was made double-circuit-capable to assure adequate capacity in the future. The CapX project sought to make the best use of the corridor for the benefit of the region and consumers, rather than attempt to maximize congestion rents by restricting the line's capacity and its potential uses and benefits.

In the real world—where siting fatigue and scarce rights-of-way foreclose the ability to site and build multiple lines—it is a mistake for the Commission to grant negotiated rate authority to merchant developers that propose to build undersized lines that will hamstring future development. While the Proposed Policy states that the Commission "appreciates the significance of this issue,"[39] it suggests that the "relevant entities" to address the problem are state siting authorities, since the Commission "has limited authority to address it directly." Proposed Policy P 22 n.35. But this statement overlooks the Commission's "duty to prevent undue discrimination in the rates, terms and conditions of public utility transmission service,"[40] and that "[its] authority to remedy

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those facilities.

[39] *See also* Commissioner Norris' statement at the 983rd Open Commission Meeting (July 19, 2012) at 25:6-10 ("I recognize there is a limit to how many transmission lines can be built, and it is important that we maximize the utilization of the land that is displaced and the people impacted by the construction of transmission lines.").

[40] Order 890, P 425.

undue discrimination is broad."[41] In Order 890, for example, the Commission noted that "[w]e cannot rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner,"[42] and held that it therefore has "an obligation to remedy these transmission planning deficiencies."[43] The Commission similarly concluded that it had statutory authority to implement the planning reforms in Order 1000 because they "are necessary to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional transmission services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential."[44]

The fact that siting authorities will also have a say in whether merchant facilities are ultimately built does not absolve the Commission of its responsibility to scrutinize merchant proposals and to assure that they will support robust wholesale power markets. And there is certainly no basis for granting transmission developer requests for approval of negotiated rate authority or of capacity allocation processes that vary from the *pro forma* OATT, in the absence of an affirmative showing by the developer that its proposed facilities will in fact expand the grid in a nondiscriminatory manner.

The Proposed Policy's statement (P 22 n.35) also ignores the Commission's responsibilities under Section 217(b)(4) of the FPA to use its authority to facilitate the planning and expansion of the grid to meet the reasonable needs of load-serving entities,

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[41] *Id.*

[42] *Id.* at P 422.

[43] *Id.* at P 425.

[44] Order No. 1000-A, P 103.

and enable them to secure long-term rights. This Commission's FPA responsibility cannot be satisfied by requiring transparency to help state siting agencies do their job.

The FPA's obligations mean that the Commission cannot rubber-stamp merchant proposals. If developers turn away customers, or fail to address identified needs, they must be required to bear a heavy burden to justify any requests for Commission approval of negotiated rates and capacity allocations, particularly where the developer has elected not to participate fully in the regional transmission planning process

3. If an affiliate is participating as a customer

The Proposed Policy would allow a merchant developer to allocate up to 100% of its project's capacity through bilateral negotiations to its own affiliates. P 12. In addition, the Proposed Policy allows merchants to adopt more favorable negotiated terms for customers with "material differences"—including for "first movers" (P 18), which the affiliates of the developer surely will be.

The Proposed Policy recognizes that special scrutiny is required when the developer's affiliate is participating as a customer. P 21(7). It states that in such situations, the developer must obtain Commission approval and make an affirmative showing that the affiliate is not being afforded an undue preference. P 23. The Proposed Policy, however, does not specify how high the Commission is setting the bar for such showings.

As the Commission has recognized,[45] the competitive risks created by allowing priority rights of access are exacerbated when the transmission developer is affiliated

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[45] *See Chinook* P 49 (recognizing the need to apply a higher level of scrutiny when affiliates of the merchant transmission developer are anchor customers due to the absence of arms' length negotiations).

with a generation developer. It invites abuse to permit a merchant developer to "negotiate" with itself regarding the project's size and affiliate-specific rates and terms of access. As discussed in Part I, the Commission has long recognized that transmission market power can be leveraged into generation market power, thus impeding competition in wholesale markets. In an affiliate situation, the merchant developer has every incentive to structure the project to advantage its generation affiliate, while disadvantaging other customers that might require access to the facility. The potential for such abuse is particularly high where the merchant is not required to offer the same rates, terms, and conditions to others, as it has granted its affiliate.

It is significant that the Commission has not previously approved any merchant developer proposal to negotiate directly with its own affiliates, nor any participant-funded developer proposal to assign its capacity allocation rights to its affiliates.[46] The Commission should not do so lightly in the future. Instead, it should clarify that affiliate participation will be viewed with a healthy skepticism and that different terms, rates, and conditions for an affiliate will not be allowed. Any final policy statement should make clear that where the generation and transmission functions associated with the project share common ownership, the developer will bear a very high burden to demonstrate the assignment of capacity to its affiliate, and the treatment of non-affiliated potential customers, is just, reasonable, and not unduly discriminatory.

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[46] *See, e.g. Nat'l Grid Transmission Servs. Corp. & Bangor Hydro Elec. Co.*, 139 FERC ¶ 61,129 at 32, 33 (2012) (declining to authorize the structure of a participant funded proposal when the proposed and only customer is an affiliate of one of the developing parties); *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 at PP 42-47 (rejecting a request for merchant developers to reserve 100% of their pro-rata capacity on the line for their affiliate). In *SunZia Transmission, LLC*, 135 FERC ¶ 61,169 (2011) ("*SunZia II*") merchant developers were given the limited authority to enter into negotiations with the affiliate of *another* partner not with their *own* affiliates for up to 50% of the capacity (*Id.* 38-39), but the remaining 50% had to be offered through an open season. *Id.* 11, 23.

4. When Exclusive or Near-Exclusive Access Is Conferred on a Single Entity

As noted above, the exclusive, or near-exclusive, holder of priority rights to a project has a strong incentive and ability to exclude competitors. Such access arrangements transform the merchant developer into the instrument of the customer, effectively positioning the customer to use control over access to what may well be an essential facility to gain a generation market advantage, inviting the same kind of abuses that led to Order 888. Concerns regarding exclusive dealing arrangements, which are even greater where an affiliate is involved, require heightened scrutiny and protections to avoid subverting open access and wholesale competition. Any policy statement that the Commission ultimately issues should make clear that exclusive or near-exclusive capacity allocations will be closely scrutinized.

E. All Projects Should Be Subject to OATT Expansion Requirements

All transmission projects, regardless of structure (*i.e.*, whether merchant or participant-funded) should be subject to OATT expansion requirements. The Proposed Policy states that the Commission will "adhere to its policy, regardless of any negotiated agreement, that any deviations from the [] *pro forma* OATT must be justified as consistent with or superior to the *pro forma* OATT." P 18 n.31. The *pro forma* OATT offers eligible customers clear rights to request interconnection and transmission service and imposes a clear obligation on transmission providers to study those requests, determine the cost of the required facilities, and offer service at rates determined consistent with Commission policy—i.e., the higher of embedded or incremental cost.[47]

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[47] *See, e.g., Pro Forma* OATT §§ 19, 27. *See also* Order 890, PP 883-84.

However, under existing policy, the Commission has expressly declined to decide whether merchant projects should be required to expand their facilities upon request.[48]

As noted, a merchant project has the same natural monopoly attributes as other transmission facilities. Especially given the potential for the merchant to benefit from congestion (which increases the value of the transmission facility) and to be influenced by the interests of its anchor customer(s) in restricting access by competitors, it is crucial that the Commission limit the degree to which a merchant developer has discretion to say, "No."

The Commission should require all merchant and participant-funded transmission providers to make a commitment to expand their transmission lines—regardless of whether the expansion is "economic"[49]—as a prerequisite to obtaining negotiated rate authority and other approvals. Such expansion obligation will not cure the anticompetitive effect of undersized lines nor eliminate the high cost of expansion. But it should mitigate to some degree the potential for foreclosure of competitive generation.

III. INCUMBENT PARTICIPANT-FUNDED PROJECTS SHOULD BEAR A VERY HEAVY BURDEN OF JUSTIFICATION

The Proposed Policy would not change the Commission's case-by-case evaluation of incumbent transmission provider cost-based participant funded projects. Proposed

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[48] *Chinook* P 58 n.38; *see also CSC New England Power Pool*, 109 FERC ¶ 61,155, PP 88-89 (2004) (finding that the New-England Power Pool OATT does not impose an obligation to expand on the owners of the Cross Sound Cable merchant transmission project). Although the Commission has reminded an *incumbent* participant-funded line developer of its pre-existing OATT expansion obligation, *Northeast Util. Serv. Co. & NSTAR Elec. Co.*, 127 FERC ¶ 61,179, PP 27, 29, it has not otherwise addressed the issue in the non-incumbent participant-funded context.

[49] The Commission has previously approved merchant OATTs in which the merchant voluntarily offered to expand the system if capacity on the lines is insufficient to meet transmission requests, but these commitments were conditioned on the merchant finding the expansion economically feasible or economically justified. *See, e.g., Mont. Al. Tie, Ltd*, 119 FERC ¶ 61,216, P 7; *Wyo. Colo. Intertie*, 127 FERC ¶ 61,125, PP 22, 49 (2009).

Policy P 27. It notes that "[i]n most cases, we would expect that an incumbent transmission provider will be able to use existing processes set forth in its OATT to allocate capacity on a new transmission facility." *Id.* However, the Proposed Policy allows incumbent transmission providers ("TPs") to identify projects to be constructed on a participant funded basis, and request "innovative" transmission development to be assessed on a case-by-case basis. Such requests should address capacity allocation "in a manner that does not constitute undue discrimination or preference and is consistent with the applicable Commission-accepted tariffs." *Id.*

To the extent it preserves existing policy, TAPS supports the Proposed Policy. Such projects should be closely examined, with the proponent bearing a very high burden to demonstrate that restricting access and pricing such access on a participant-funded basis is "consistent with or superior to" the OATT;[50] that the proposed development does not end-run or subvert the OATT, planning process, or transmission queue; and does not constitute either undue preference (for the incumbent or its affiliates) or undue discrimination (against customers subjected to "and" pricing). As the Commission has rightly recognized, when an incumbent TP seeks "merchant" status in the development of a transmission project, grant of such status can "concentrate . . . control over transmission . . . and potentially increase [] market power."[51] For this reason, the Commission applies different rules to incumbent TPs (and their affiliates).[52]

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[50] *See* Order 888, at 31,770.

[51] *Mountain States*, 127 FERC ¶ 61,240, P 62.

[52] For example, in *Puget Sound Energy, Inc*., 138 FERC ¶ 61,121, PP 13-19 (2012), the Commission recently allowed simultaneous exchanges that do not involve the marketing function of a public utility TP without prior Commission approval, but refused to generically authorize those that do, noting the potential for circumvention of transmission service requirements.

To the extent access to the project capacity is not made available at non-pancaked rates pursuant to the incumbent's OATT, such projects represent a "back to the future" effort to reinstate the balkanized patchwork of open and closed systems that Order 888 set out to eliminate.[53] Unless the incumbent's share of the project is incorporated in its OATT,[54] participant-funded treatment amounts to "and" pricing, contrary to the Commission's reaffirmation of "or" pricing in Order 890.[55] It also runs counter to general principles requiring roll-in of networked facilities.[56]

The Commission should reject incumbent TP projects that attempt to treat upgrades required to meet customer needs on a timely basis as projects subject to participant funding, while upgrades needed to serve the incumbent's own load or generation needs are included in the Order 890/1000 planning process or otherwise rolled in. Particularly where the incumbent constitutes the overwhelming majority of its transmission load, participant funding may provide a convenient means for the TP to jump the queue for the benefit of its generation function. Either way, there is a significant opportunity for the incumbent to exploit its control over transmission. In

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[53] Order 888, at 31,691-92, required a jurisdictional TP to revise its third party contracts so it could place its share of the capacity in multi-owner lines under the TP's OATT, thereby providing access to customers at non-pancaked rates. Significantly, this requirement is not limited to lines within the incumbent's footprint. *See also Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160 (2010).

[54] For example, the proposed SunZia transmission line is a joint project between merchant entities and incumbent transmission providers. While the merchant owners sought negotiated rate authority, the incumbent TPs will be making "their shares of the Project available under their existing OATTs." *SunZia Transmission, LLC*, 135 FERC ¶ 61,169, PP 11, 23 (2011).

[55] Order 890, PP 883-84.

[56] The Commission has long held that rolled-in rate treatment of network facilities is appropriate even where facilities would not be needed "but for" a particular customer's request. *See, e.g., Northeast Tex. Elec. Coop., Inc.*, 108 FERC ¶ 61,084 (2004), *reh'g denied*, 111 FERC ¶ 61,189 (2005); *Pub. Serv. Co. of Colo*., 62 FERC ¶ 61,013, at 61,061-62 (1993); *Midwest Indep. Transmission Operator, Inc.*, 98 FERC ¶ 61,141, at 61,412 (2002), *opinion after appeal*, 102 FERC ¶ 61,192, *clarified*, 104 FERC ¶ 61,012 (2003), *pet. for review denied sub nom. Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *Western Mass. Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999).

denying negotiated rate authority, the Commission recognized these improper incentives and the opportunity for abuse:[57]

> Petitioners' request for negotiated rate authority on the MSTI Project establishes an undesirable incentive vis-à-vis NorthWestern's obligation to expand its system at cost-based rates pursuant to its OATT. Despite this obligation, the affiliate relationship between NorthWestern and MSTI creates the incentive for NorthWestern to withhold capacity and/or to delay the timely expansion of its facilities in response to requests for service under its OATT as a means of favoring its affiliate project. . . . In addition to this practical concern as to NorthWestern's obligation to expand, conveying negotiated rate authority on MSTI could also provide an incentive for the combined affiliates to impede the timely completion of service requests on NorthWestern while expediting requests for service on MSTI, if the combined affiliates are able to recoup a potentially higher return on their investment through negotiated rates on MSTI. Therefore we find that negotiated rate authority . . . could undermine or supplant NorthWestern's obligation to expand its system at cost-based rates, which is an important component of open access.

The potential for abuse is not significantly ameliorated by participant funding the project on a cost basis, rather than through negotiated rates. Nor do the Order 890 and 1000 planning processes protect against this potential for abuse. [58]

Thus, any final policy statement should continue to reaffirm existing policy and make clear that incumbent participant-funded cost-based projects will be subjected to a very high burden to demonstrate that any deviation from the OATT is just, reasonable, and not unduly discriminatory or preferential.

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[57] *Mountain States* P 63 (footnotes omitted).

[58] Order 1000 acknowledges that it is in the economic self-interest of TPs to discriminate in deciding whether and how to expand the system (PP 254, 256), and that a regional planning process can provide an opportunity for such undue discrimination (*see, e.g., id.* P 83). Order 890, as affirmed by Order 1000, left planning decisions to jurisdictional TPs, with others permitted only the opportunity to provide input. Order 890, P 495 & n.289; Order 1000, PP 68 & n.57, 153, 203, 207-09, 211, 331, 705.

CONCLUSION

For the reasons discussed above, the Commissioner should maintain and reinforce its existing merchant and non-incumbent participant-funded transmission policies (as urged by TAPS in its March 29 Comments), as well as preserve existing policy regarding incumbent participant-funded projects. To the extent it nevertheless proceeds to relax its policy regarding merchant and non-incumbent participant funded transmission projects, the Commission should adopt TAPS suggestions to mitigate the adverse impacts of the Proposed Policy.

Respectfully submitted,

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September 24, 2012